FILE COPY

Office - Supreme Court, U.
FILED
APR 14 1950
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

No. 616.

FEBRUARY TERM, 1950.

In the Matter
of
The Application of the PLAINFIELD HOTEL CORPORATION for a Writ of Certiorari,
Petitioner,
against
THE CITY OF BUFFALO,
Respondent.

REPLY BRIEF OF PETITIONER, PLAINFIELD HOTEL CORPORATION.

JAMES P. KOHLER &
JAMES P. KOHLER, JR.,
Counsel for Petitioner,
No. 109 Broad Street,
New York City 4, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

SUBJECT INDEX.

PAGE

Statement 1

Constitutional Questions (Fol. 34) of Petition 7

Redemption of Land From Tax Sales 7
The petition for removal is not too late 9

Fourteenth Amendment of the Constitution of United States 11

CITATIONS.

Beach 70th Street Holding Corp. vs. Beachland, 161 Misc. 445, 291 N. Y. Supp. 262 6
Detroit vs. Detroit City Ry., 54 Fd. 1 ..... 10, 11
Fox vs. Peacock, 153 App. Div. 887, 138 N. Y. Supp. 535 4
Griffin vs. Griffin, 66 S. Ct. 556, 327 U. S. 220, 90 L. Ed. 635 *re* hearing denied 66 S. Ct. 975, 328 U. S. 876, 90 L. Ed. 1645 11
Grover vs. Florence, 18 Wall. 553 4
Kean vs. Bailey, 82 Fd. Sup. 260 11
Mahnk vs. Blanchard, 233 App. Div. 555, 253 N. Y. Supp. 307 6
People *ex rel.* Russell vs. Doty, 234 N. Y. 559, 138 N. E. 446 7
Powell vs. Home Seeker Realty Corp., 131 Misc. 590, 228 N. Y. Supp. 131 ..... 5, 10

STATUTES.

Fourteenth Amendment of the Constitution of United States, Section 1, Paragraph 1292 11
New York State Tax Law:
Section 134 7
Chapter 60 of the Consolidated Laws, Article 6,
Section 127 8
Section 130 8
Section 139 8
N. Y. Civil Practice Act:
Section 83 4
Rule 260 6
Rule 19, 28 USCA (1948) 4, 11

II.

Miscellaneous.

PAGE

New York Rules of Civil Practice:
Nos. 188, 190, 191 and 192 ..... 2, 5, 6, 10
Rule 230 ..... 9, 10

IN THE

Supreme Court of the United States

No. 616.

FEBRUARY TERM, 1950.

In the Matter
of
The Application of the PLAINFIELD HOTEL CORPORATION for a Writ of Certiorari,
Petitioner,
against
THE CITY OF BUFFALO,
Respondent.

REPLY BRIEF OF PETITIONER, PLAINFIELD HOTEL CORPORATION.

Statement.

The brief of the Respondent reads more like an affidavit, as many statements are made which are contrary to the facts.

It is not true that the petitioner did not offer a proposed answer on the motion to open the alleged default. The proposed answer contained a defense of a tender to pay

all taxes with interest and penalties, but as the County Judge denied the motion from the bench before this could be explained, the answer was not handed up and made part of the record. This is one of the indications of prejudice on the part of the County Court.

Just after the Order to Show Cause was granted and served on Respondent in the forenoon, May 25, 1948, the attorney for the Respondent met Mr. Kohler in the Court House and said that the County Judge *had ordered* the argument for 2 P. M. of that same day, instead of on May 27th, the return day, or two days later, thereby giving no time to prepare for the argument to which there was no consent.

At the time of argument of this motion, Petitioner was given no consideration, and the motion was denied, although the Court was told that the alleged default judgment was entered without the notice required by New York Rules of Civil Practice Nos. 188 and 190, *and thereby without due process of law*, and in violation of Petitioner's Constitutional rights.

In the Respondent's brief, the word, "duly" is used throughout, when in fact there was no "due" practice on its part, as the Respondent proceeded without regard for the Rules of Practice, as shown in the following steps:

The Petitioner owned a purchase money mortgage on the property in question, from the Spann Realty Corporation, which had defaulted on taxes and interest and was actually dissolved December 16, 1946 by the proclamation of the State and before this action was commenced. Evidence of this proclamation is annexed to this brief, pp. 1 and 2, entitled "Additional Papers" and made a supplement hereto.

In the argument of this case in the U. S. Court of Appeals for the Second Circuit, the attorney for the Respondent made a stipulation in writing that the Spann Realty Corporation had been dissolved before this suit was brought, which stipulation is as follows:

"IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties hereto, that the defendant Spann Realty Corporation was dissolved by proclamation of the Secretary of the State of New York, published December 16, 1946.

Dated, October 14, 1949.

ADON W. CROSBY,
Attorney for Appellees.

JAMES P. KOHLER,
Attorney for Appellants."

Counsel for the Respondent, *surprisingly*, has failed to admit in his brief that such a stipulation was made, and he proceeds to argue that the Spann Realty Corporation is a party to this suit.

The fact that Spann Realty Corporation became non-existent before this suit was brought on the 24th day of February 1947, has the effect of its title to the property in question, being returned to the Petitioner, Plainfield Hotel Corporation, as the purchase money mortgagee, and although the Petitioner had brought a suit of foreclosure against the Spann Realty Corporation on February 28, 1944 for non-payment of taxes and interest, the dissolution of the Spann Realty Corporation, made that foreclosure suit superfluous. However, a copy of the foreclosure proceedings is included in the "Additional Papers" annexed hereto.

By reason of the foregoing, it is clear that Petitioner is a party in interest, as title holder besides its interest in the mortgage at the time this suit was commenced.

As to the Petitioner's rights as mortgagee, it is well established, that the assignee of a chose in action, may proceed in the name of the assignor, see Fox vs. Peacock, 153 App. Div. 887, 138 N. Y. Supp. 535, and under N. Y. Civil Practice Act Sec. 83, providing that in case of a transfer of interest, the action may be continued by or against the original party.

Because the Spann Realty Corporation had been dissolved, it was not a necessary party to this action, and hence it was not properly joined as a party in interest as a defendant citizen of the State in which this action was brought.

The other defendants were merely lienors and not necessary parties to the foreclosure of the tax liens.

The defendant, Spann Realty Corporation, having been dissolved, and the other defendants being not necessary parties either, there was no other necessary party defendant than your petitioner, see Grover vs. Florence, 18 Wall. 553.

In determining diversity of citizenship, the party who is an indispensable party to the litigation, must be a non-resident, Rule 19, 28 USCA (1948) which is the case at bar, petitioner being a New Jersey corporation.

The petitioner's motion to vacate the service of the summons was denied in the County Court, without any proof that the service had been made on an officer of Plainfield Hotel Corporation, and against proof that the one served was not an officer and had never been an officer or in any way connected therewith. No opinion was rendered by the County Court, nor by the Appellate Division sustaining it.

The petitioner did not file a general appearance because it was never served with the summons, but it did appear specially to object thereto. The procedure for proper legal service was not followed by Respondent, and judgment was entered on this illegal service without notice of application for judgment, and without an opportunity to serve an answer, and against Rules of Civil Practice.

The action was referred by the County Court to a Referee without any notice of reference, or of a hearing as required by Rules of Civil Practice 190, sub. 2. This was also a violation of "due process." So the hearing before the Referee was not "duly held" as Respondent claims. The Referee's report was never served on Petitioner, and on said report the Clerk entered judgment, without notice of application, or notice of entry, and not "in accordance with the practice of said Court," and was not "duly entered" in the Erie County Clerk's Office on the 30th day of April, 1948. Powell vs. Home Seeker Realty Corp., 131 Misc. 590, 228 N. Y. Supp. 131.

By these improper steps, the Petitioner's rights to "due Process" were violated and prejudiced.

Petitioner knew from a letter from the County Clerk May 7, 1948 that a judgment had been entered on April 30, 1948, but no notice of a sale was given. Petitioner learned of a sale only because of being in Buffalo on another case. Petitioner participated in the bidding, and made the highest public bid of $14,100 which was estimated to cover the tax bills, but Respondent made a higher bid of $15,000 to buy it in, and thereby obtained no revenue from the sale, but the vacant land, and prevented thus far the large veterans housing project which petitioner had planned thereon with financing arranged. This certainly shows prejudice against Petitioner.

The said Order to Show Cause to vacate the judgment was not in violation of Rule 260 Civil Practice Act, which reads as follows: "Notice of application for stay of sale. No order to stay a sale under judgment for the foreclosure of *a mortgage* shall be made by a judge out of court, except on a notice of at least twenty-four hours to the plaintiff's attorney."

It is respectfully submitted that the said Order to Show Cause was on twenty-four hours notice, because it was made on May 25th, 1948 and returnable May 27th, and was served in the forenoon of May 25th and vacated and denied at 2 P. M. of the 25th of May.

The right to redeem land sold for taxes is set forth in New York State Tax Law.

There was no default in pleading as Respondent claims, because the Respondent failed to give notice of the entry of an order denying the motion to set aside the service of the summons, as required by Rule 190, see Mahnk v. Blanchard, 233 App. Div. 555, 253 N. Y. Supp. 307, "In order of reference to ascertain the amount due on a mortgage being foreclosed, court erred in inserting provision for judgment and sale without notice to tenant who had appeared." Beach 70th Street Holding Corp. v. Beachland, 161 Misc. 445, 291 N. Y. Supp. 262, "The defendant in a foreclosure action, against whom judgment may be taken on application to the court, and who has appeared generally but has made default in pleading, is entitled to at least five days notice of the time and place of the application for judgment."

The judgment herein was entered contrary to Rules of Civil Practice, Nos. 188, 190, 191 and 192.

Constitutional Questions (Fol. 34) of Petition.

It is respectfully submitted that the foregoing breaches of rules of practice are not only evidence of prejudice against this petitioner but also violated its right to due process of law as provided in the Fourteenth Amendment of the Constitution of the United States.

A Constitutional question is envolved as to the right of Petitioner to redeem its real property within one year after tax sale as provided in the New York State Tax Law:

Redemption of Land From Tax Sales.

"Section 134: Notice to occupants:
The incumbrance of a US Deposit Fund *mortgage* is not cut off by a tax sale and the subsequent conveyance of the property to the County or to an individual, Op. Atty. Gen. 1944—153.

In the case of *Sheldone vs. Russell,* 154 N. Y. Supp. 632, 91 Misc. 278, it is held: 'The certificate of the County Treasurer, *reciting that due notice of the tax sale was served upon the occupant* and certifying *that the lands remained unredeemed,* being recorded with the deed, was a compliance with Tax Law Sc. 134, requiring such notice to be recorded with the conveyance.' Tax Law, Art. 6, Sc. 131, which deals with sales by the comptroller, provides that after one year from the sale the comptroller shall, after application in writing therefor, execute to the owner of the tax certificate, a conveyance of the lands sold for taxes and *not redeemed.*"

In the case of People *ex rel.* Russell vs. Doty, 234 N. Y. 559, 138 N. E. 446, "Facts showed an appeal by permission, from an order of the *Appellate Division* of the Supreme Court in the *Fourth Judicial Department* which CON-

FIRMED A DETERMINATION of county treasurer permitting the *redemption* of certain real property, which had been sold for taxes. A commissioner appointed under section 137, reported that in view of the fact that no notice was served as prescribed in section 134 of the Tax Law, that the title owner of the lands was entitled to redeem the same, by paying the amounts necessary for such purposes as provided in section 137 of the Tax Law."

The Tax Law of the State of New York, being Chapter 60 of the Consolidated Laws, *Article 6, Section 127, "REDEMPTION OF LANDS."* "The owner or occupant of any lands sold by the department of taxation and finance for taxes, or any other person having an interest therein at the time of the sale, may redeem the same from such sale at any time within one year after the last day of the sale * * *."

Section 130, "Notice of unredeemed lands. The department of taxation and finance shall, at least three months before the expiration of the one year allowed for the redemption of lands, sold by it for taxes, cause a notice to be published once in each week for at least six weeks successively, the last publication to be at least six weeks before expiration of the year, in the newspapers * * * specifying particularly every parcel unredeemed, and the amount necessary to redeem same."

Section 139: Redemption by mortgagee. "The holder of any mortgage which is duly recorded at the time of the sale, may at any time after the sale of all or any part of the mortgaged premises for unpaid taxes or assessments, and before the expiration of six months after the time of filing of the evidence of the giving of the notice required by the preceding section, or if evidence of the giving of

such notice be not filed, then at any time within 36 months after the sale, and not thereafter, *redeem the premises* so sold, or any part thereof from such sale."

The petition for removal is not too late.

There was no default on the part of the Petitioner because no copy of the decision, and order with notice of entry, of the Appellate Division had been served before entry of judgment, as the record plainly shows. There was no notice of application for a Referee and no notice of hearing, or of the report of the Referee. These facts show that there was no default under the State practice. However, since the County Judge, on the insistence of the Corporation Counsel, held that there was a default, the Petitioner moved to vacate it, and for leave to answer the complaint. This motion was also denied *without opinion,* which is claimed to be an abuse of discretion. The land was then sold without notice to Petitioner, but it learned of same by being in the City of Buffalo on another matter.

Petitioner then filed its petition and bond in the United States District Court for removal on the grounds of diversity, and Constitutional questions because of lack of "due process of law", and prejudice and local influence, which was denied.

But the time for the petitioner to answer or plead in the action had not then expired, because no service of the order of the Appellate Division with Notice of Entry had been made on Petitioner as required by New York Civil Practice Act, so that the time to appeal from that order would not commence to run until such notice of entry were given, Rule 230 Rules of Civil Practice.

In the case at bar the time to answer had not commenced to run because the decision and order of the Appellate Divi-

sion regarding the service, had never been served with notice of entry, as required by Rule 230, R. C. P.

The petition, therefore, was not filed "too late," as the suit had not been tried in the State Court by reference to a referee in compliance with the State law because it was done without notice as required by Rules 188, 189 and 190. The decision had not become final and was subject to be vacated, as held in Powell vs. Home Seeker Realty, *supra.*

In the County Court, no hearing on the merits were allowed, and petitioner was denied its day in Court although it asked for same, which constituted lack of "due process of law".

In the case at bar, the State Court proceedings did not comply with the rules of practice, so that the judgment was subject to being vacated, and the removal petition therefore was filed before a "trial" in the state court, because the state court granted judgment without notice required, without hearing, without notice of application for judgment, or entry of judgment, after a Notice of Appearance, making the "trial" a nullity. The *notice of entry* of the order of the Appellate Division was never given as required by Rules of Civil Practice, and the time does not commence to run until such notice is served.

In the case of Detroit vs. Detroit City Ry., 54 Fd. 1, it is held: "If it was not legally, then it was not in Court and there could have been no trial of its case until after it had filed its answer." "There could have been no trial on the order *pro confesso because that order was void.* The order could *only be valid in case all the steps required by the statute of Michigan* in summoning an absent defendant had been literally and exactly complied with." *"If it was not legally served, then it was not in Court,* and there could

HAVE BEEN NO TRIAL of its case until after it had filed its answer." "The words, 'any time before trial' should be given their ordinary meaning, *i. e.* 'at any time before the first trial thereof and up to the time of that first trial whether that occur at one term or another, *the right of removal under the local prejudice clause remains.*' "

In determining diversity of citizenship, the party who is an indispensable party to the litigation, must be a non-resident, Rule 19, 28 USCA (1948).

SUITS IN EQUITY AND AT LAW ARE BOTH REMOVABLE: Detroit City Ry. vs. Detroit, 54 Fd. 1.

Detroit Ry. vs. Detroit, 54 Fd. 11 "a petition may be filed at any time before trial even though many terms and many years have passed."

Fourteenth Amendment of the Constitution of United States.

Section 1 Paragraph 1292; "A Judgment *in Personam* directing execution to issue and thereby purporting to cut off all available defenses, may not be rendered, irrespective of the descendant's domicile or whereabouts without some form of notice by personal or substituted service, which is essential even for a Judgment *in rem* so far as property within the jurisdiction is concerned." See:

Griffin vs. Griffin, 66 S. Ct. 556, 327 U. S. 220, 90 L. Ed. 635 *re* hearing denied 66 S. Ct. 975, 328, U. S. 876, 90 L. Ed. 1645.

"Due process" forbids any exercise of judicial power substantially affecting a ~~descendant's~~ defendant's rights without notice.

Determination of rights without reasonable opportunity for hearing and without valid service would violate the basic constitutional right, Kean vs. Bailey, 82 Fd. Sup. 260.

The Petition for a Writ of Certiorari ought to be granted, mainly because the petitioner is being deprived of its property without due process of law and in violation of its Constitutional rights to redeem its property as provided by the laws of New York State, which rights have been overlooked by the lower Courts, and disregarded, to Petitioner's great loss.

April 13th, 1950.

Respectfully submitted,

JAMES P. KOHLER &
JAMES P. KOHLER, JR.,
Attorneys for Petitioner.